

EXHIBIT H

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 JAVIER CASTILLO MARADIAGA,

4 Plaintiff,

5 v.

21 CV 842 (KPF)

6 THOMAS DECKER, *et al.*,

7 Defendants.

Decision
(via Microsoft Teams)

8 -----x
9 New York, N.Y.
March 4, 2021
4:05 p.m.

10 Before:

11 HON. KATHERINE POLK FAILLA,

12 District Judge

13
14 APPEARANCES

15 ALINA DAS

16 PAIGE AUSTIN

Attorneys for Plaintiff

17 AUDREY STRAUSS

18 United States Attorney for the
Southern District of New York

19 REBECCA FRIEDMAN

Assistant United States Attorney

1 (Case called)

2 MS. AUSTIN: Good afternoon, your Honor, Paige Austin
3 from Make the Road New York, and I am joined by my cocounsel,
4 Alina Das, from the immigrants rights clinic at the New York
5 University School of Law, also on behalf of petitioner.

6 THE COURT: Thank you, and good afternoon to you both.
7 Ms. Friedman representing the government.

8 MS. FRIEDMAN: Yes. Rebecca Friedman, your Honor,
9 representing the government.

10 THE COURT: Thank you as well. Thank you for
11 participating, especially given the lateness of the hour.

12 I do have a decision. It is an oral decision. And as
13 a result of that, I would show you, but there are a lot of
14 highlights and circles and arrows and it may not be the best
15 prose, but it is, I believe, what is the best result in this
16 case. Before I render that decision there are a few questions
17 that I wanted to ask you about recent developments.

18 Ms. Austin, I'll ask you, and you'll defer to Ms. Das
19 if it is appropriate.

20 There was a hearing that occurred on Tuesday regarding
21 a possible bond application. The application was denied.
22 Because it's an area with which I am unfamiliar, this Third
23 Circuit convention, when there is such a hearing, are there
24 actually conditions that are proposed or does the immigration
25 judge, or whomever, agree to the concept of a bond and let the

1 parties figure out what is an appropriate level?

2 MS. AUSTIN: That is a good question, your Honor, and
3 I think could be answered in two ways. The first is what the
4 immigration judge would have the authority to do and the second
5 is what he did in this case.

6 We certainly think that the immigration judge does
7 have the authority to set conditions. However, that is a
8 matter of some disputed practice in the immigration court and I
9 do not believe, and my cocounsel, Ms. Das, can correct me if I
10 am wrong, but I do not believe in this case the immigration
11 judge considered any alternatives to detention or any
12 conditions of release apart from a monetary bond.

13 THE COURT: I see. What is apparently not an
14 analogue, which is the criminal setting that I face, it is
15 often the case that when a bail package or bail argument is
16 had, there is a proposal from which one begins. It is not just
17 the idea of bail, no bail. The defendant's counsel will
18 propose terms of bail that they submit meet the requirements of
19 the Bail Reform Act.

20 Here, are you saying to me that the IJ could have got
21 to that point but did not in fact get to that point and,
22 therefore, there never were conditions discussed?

23 MS. AUSTIN: I can certainly represent that there were
24 no conditions discussed and that that is something, you know,
25 that could be considered. So I think that your Honor is right,

1 but I do want to give my cocounsel an opportunity to weigh in
2 here if she has a different view on the matter.

3 THE COURT: Ms. Das.

4 MS. DAS: Yes, your Honor. My cocounsel is right.

5 I just would underscore that in this particular
6 instance many immigration judges believe that they don't have
7 the power to consider alternatives to detention, such as
8 electronic monitoring or other conditions, in addition to a
9 monetary bond, and that this judge in particular has taken that
10 position in the past, which is why we assume he did not
11 consider it here. That issue has been litigated in other
12 cases.

13 So, for example, in the case that we cited in our most
14 recent letter today, the *Uzmande* case, this judge in particular
15 was faulted for not having considered alternatives to detention
16 as part of his analysis in a Guerrero-Sanchez bond hearing. It
17 is an issue of dispute, and I think that is one of the reasons
18 why we have these administrative bond hearings. This was a far
19 cry from the type of constitutionally adequate bond hearing
20 process that our clients often seek.

21 THE COURT: I am going to hear from Ms. Friedman in a
22 moment on this topic.

23 But before I do, Ms. Austin, you did send me the
24 letter. Each of you has sent me a number of letters. I commit
25 to you that I've read them.

1 But what is it that you would like me to deduce from
2 the letter regarding the bail hearing? I intuit that one of
3 the things you want me to understand is, he's not been released
4 on bail, *Mapp* relief would be really nice. But I want to
5 understand what, if anything, you are asking me to understand
6 from that bail application and its failure.

7 Ms. Friedman, to the extent there is something you
8 want me to understand from what happened at that hearing, you
9 will let me know.

10 Ms. Austin.

11 MS. AUSTIN: Thank you, your Honor. We did send you
12 two -- we filed two letters since that hearing took place. The
13 first was simply to apprise the Court that he had not been
14 released and the *Mapp* claim for that reason does remain live.
15 It was not mooted out by the outcome of that hearing.

16 We went on to respond to the government with I think
17 some additional important takeaways from our perspective.

18 First, of course, the bond hearing and indeed the *Mapp*
19 requests have no bearing on the primary forms of relief at
20 issue here, namely, the stay that Mr. Castillo seeks for the
21 duration of his petition.

22 Second, we wanted to make the point that he does
23 continue to seek, as a secondary form of relief, release on
24 *Mapp* for the duration of this petition, and that is analyzed
25 under a different standard and, obviously, by your Honor, a

1 different court, than the bond hearing analysis that occurs in
2 the administrative proceedings.

3 Our position is that it really does not have any
4 bearing on the *Mapp* analysis, but we did want to make that
5 point to your Honor and also to underscore some of the issues
6 that arose in the bond hearing in our most recent letter,
7 again, not because we are seeking review of that bond hearing
8 before this Court or, you know, essentially seeking, for
9 example, an appeal through this court.

10 We submitted those points for your Honor only in
11 response to what he understood to be the government's
12 suggestion that this might in some way bear on Mr. Castillo's
13 claims to relief. Our position here is that it does not,
14 though, of course, it is relevant inasmuch as the issue of
15 release under *Mapp* remains before your Honor.

16 THE COURT: Thank you.

17 Ms. Friedman, just following on what Ms. Austin was
18 saying, are you making arguments to me today regarding the
19 instant motion for a preliminary injunction based on what
20 happened at that hearing on Tuesday?

21 MS. FRIEDMAN: No, your Honor.

22 THE COURT: That's the answer. I didn't want to cut
23 you off if there was something you wanted to add.

24 MS. FRIEDMAN: No. I would just like to answer the
25 question that your Honor had posed to the petitioner.

1 THE COURT: Yes.

2 MS. FRIEDMAN: The IJ in this case found that ICE had
3 met their burden of finding that petitioner is a danger to the
4 community. And based on that fact, he did not need to go into
5 any other alternatives.

6 THE COURT: Thank you.

7 Ms. Friedman, you are doing very well. Your answers
8 are leading to my follow-up questions.

9 You've advised me about the charges that were brought
10 by the district attorney and that were later dismissed and the
11 reasons why they were dismissed.

12 If you know, are you suggesting to me that if I were
13 to let Mr. Castillo out on *Mapp* release that the DA's office
14 would reinstate the charges? I ask this not knowing whether
15 they have an inclination to do so, whether they have the
16 ability to do so. But I did not know if one of your reasons
17 for sending me that letter was to let me know that *Mapp* release
18 would be futile because he would just get picked up by the DA's
19 office anyway.

20 MS. FRIEDMAN: I have no knowledge of what the DA's
21 office plan would be if he were to be released.

22 THE COURT: Thank you.

23 You heard me ask Ms. Austin what I am to intuit from
24 her letter. I ask you the same. What do you want me to know
25 as I make this decision on the motion for a preliminary

1 injunction regarding the fact of his arrest and what you now
2 understand to be the reasons why the charges were dropped?

3 MS. FRIEDMAN: Sure. In the oral argument I talked a
4 lot about the factors that the field office director and the
5 ombudsman considered, the criminal charges, the backgrounds.
6 So this was part of the information that was considered, this
7 type of criminal charges. The information that was in front of
8 the IJ was also information that ICE was aware of as well.

9 THE COURT: I see.

10 Thank you.

11 I hesitate to ask this question of each side and yet I
12 will. I have been receiving daily letters from everybody. Do
13 I have everything? The most recent letter that I received was
14 the petitioner's letter in response to the government's letter
15 and that was received a few hours ago.

16 Ms. Austin, is there something else from you that I
17 should know about? Because I don't want to decide this without
18 having all the documents with me.

19 MS. AUSTIN: No, your Honor. It is a fast-moving
20 case. It is a case in which there are requests, you know,
21 being made to ICE and, obviously, now potentially an appeal in
22 the bond hearing. So, as you have observed, I think our
23 ability to update you on the underlying events in the case is
24 basically limitless. But I think you have before you at this
25 point the crucial information for the purposes of this motion.

1 THE COURT: Thank you.

2 Ms. Friedman, is there additional information or
3 letters that you have sent me that I didn't know to look for
4 before signing on to this conference?

5 MS. FRIEDMAN: No, there is nothing else for the
6 government. The government believes that all of the issues
7 have been well aired in the briefing, in oral argument, and the
8 subsequent letters.

9 THE COURT: I will go with thoroughly. I will decide
10 whether thoroughly and well equate in a moment.

11 Give me a moment, please, to look at my notes and make
12 sure I don't need to add anything based on the conversation
13 I've just had with you.

14 This will be an oral decision. It won't be a short
15 one, although I'll try. If you are not sitting down, please
16 sit down and make yourself comfortable for this.

17 I'm also going to ask you to excuse me in advance
18 because it is more important to me that I properly deliver my
19 decision and less important to me that I make eye contact with
20 you as I'm doing so. If I end up staring down for the next 20
21 or so or more minutes, take no offense, please. Just excuse me
22 while I make sure I don't have to add anything.

23 I will begin.

24 Let me begin by thanking you each of you, and the
25 three of you have done so much work on this, for the work that

1 you've done on a compressed schedule on these very significant
2 issues. I was thanking the government for providing me
3 up-to-date information regarding the dates before which Mr.
4 Castillo would not be deported. I also want to thank both
5 sides for providing me updated information about matters that
6 have developed in the other proceedings in the case.

7 I recognize, under the schedule most recently
8 submitted to me by the government, that I still have time to
9 think about this. But I will be painfully candid with you. I
10 have thought about little else but this case for the past
11 couple of days, and I've come to the point of realizing that
12 additional days are not going to provide me greater clarity.

13 That is because -- and I can say this, and you don't
14 have to agree with me, but maybe quietly you do -- this case
15 implicates a number of legal issues for which there is no clear
16 guidance from the Supreme Court or the Second Circuit. I have
17 done my best to be faithful to the law, but as you will see,
18 there are issues I've identified as to which the relevant
19 precedents are in conflict, and there are issues as to the
20 which the relevant precedents hint at but do not supply an
21 answer.

22 It is the rare district judge who looks forward to
23 being appealed. I am not that judge. There are reasons for me
24 to hope that I am not appealed here. But if I am, a possible
25 good that can come from this case, and from that appeal, is the

1 clarity that each of the participants to this litigation,
2 including myself, deserve on these knotty jurisdictional,
3 constitutional, and statutory issues.

4 For reasons that I will now explain, I am granting
5 petitioner's motion for preliminary injunctive relief, in the
6 form of staying his removal from this country so that he can
7 pursue his motion to reopen the case with the BIA and,
8 potentially, a petition for review with the Second Circuit and
9 so he can apply for renewal of his DACA eligibility.

10 On that latter point, because of the policy identified
11 by the parties that forecloses consideration of such renewal
12 while petitioner is detained, I am granting relief pursuant to
13 *Mapp v. Reno* to this extent. I will release Mr. Castillo on a
14 bond so that he can seek DACA renewal. And it may be that this
15 release permits him to address other aspects of his immigration
16 litigation more easily. But it is the DACA renewal that, to
17 me, necessitates his release under *Mapp*.

18 If his DACA renewal request is denied, and if he runs
19 through his appeal process or if that appeal process does not
20 require him not to be detained, I will listen to the government
21 if they then move again for his redetention. My point is, he's
22 out because you've told me that he can't apply for DACA renewal
23 while he's out. If that matter comes to its resolution, then I
24 will reconsider as appropriate.

25 I will speak only very briefly about the factual

1 background because each of you is intimately familiar with it.
2 The petitioner came from Honduras at age 7 in approximately
3 2002. His parents were here under a temporary protected status
4 for which he is not eligible. He has been subject to a final
5 removal order since 2004. He did have DACA status from 2012 to
6 2019 but did not thereafter review. He was detained by the
7 NYPD in December of 2019 and turned over to ICE, I am told, in
8 violation of local detainer law and held in ICE custody since
9 then. There was a motion to reopen the removal proceedings
10 that was denied by the immigration judge in January 2020. The
11 BIA dismissed the appeal in October 2020, and there was no
12 appeal to the Second Circuit.

13 He is currently held at the Hudson County Correctional
14 Center in New Jersey. There was a motion to reopen removal
15 proceedings pending before BIA since January 28 of 2021. It
16 claims, among other things, ineffective assistance of counsel
17 in the prior motion-to-reopen proceedings. The BIA has not
18 decided the motion to reopen, but they have denied the stay of
19 removal. This habeas petition was filed on January 29 of 2021.
20 Since then, ICE has denied requests for release from custody
21 pending resolution of the motion to reconsider or to reopen.

22 There are four claims brought in the habeas petition.
23 The first is a violation of constitutional, statutory, and
24 regulatory rights to adjudication of the motion to reconsider
25 and to reopen removal proceedings for persecution-based claims.

1 There is a claim of violation of constitutional and
2 statutory rights adjudication of the parole request and DACA
3 protection.

4 There is a claim of violation of agency policy
5 protecting petitioner from imminent deportation. It is a
6 claimed violation of the Administrative Procedure Act. And
7 there is a request for release pending adjudication, pursuant
8 to *Mapp v. Reno*.

9 The instance preliminary injunction motion seeks an
10 injunction of removal, a stay of removal pending adjudication
11 of the habeas petition, as well as release on bail under *Mapp*.
12 The government has asked for denial of petition on the merits
13 and denial of the preliminary injunction motion as mooted by
14 the denial of the petition on the merits.

15 I am going to begin by speaking of the preliminary
16 injunction standards. I would say that's the parties' first
17 dispute. I guess that's the first dispute that's coming up in
18 the resolution of this motion.

19 The government is arguing for the strictest standard,
20 which requires a showing of clear or substantial likelihood of
21 success on the merits. This is based on the theory that the
22 relief the petitioner seeks would either alter the status quo
23 or provide the ultimate relief sought in the petition.

24 I just want to pause and recognize that I know the
25 government actually wishes that I dispense with this motion

1 entirely, acknowledge that I lack jurisdiction to consider the
2 petitioner's claims, and separately lack venue for his fourth
3 claim, and deny and dismiss the habeas petition. But as I'm
4 about to explain, I'm not prepared to do that on this record,
5 where petitioner has claimed to be mounting only noncore
6 claims, and I will instead consider the petitioner's motion.

7 The petitioner himself is arguing for a lower
8 standard, which requires a showing of a likelihood of success
9 on the merits, or a serious question going to the merits to
10 make them a fair ground for trial, with the balance of
11 hardships tipping decidedly in petitioner's favor. Ultimately,
12 I'm adopting the serious-questions standard, but I want to
13 explain to you how I get there because it wasn't evident to me
14 and it may not be evident to you.

15 To begin, I don't believe that petitioner is seeking a
16 mandatory injunction, but rather a prohibitory injunction. The
17 difference being that the prohibitory injunctions maintain the
18 status quo and the mandatory injunctions alter it. There are
19 many cases for this proposition. Just one is *North American*
20 *Soccer League, LLC v. U.S. Soccer Federation*, 883 F.3d 32, a
21 Second Circuit decision from 2018, citing *Tom Doherty*
22 *Associates, Inc. v. Saban Entertainment, Inc.*, 60 F.3d 27, a
23 Second Circuit decision from 1995.

24 It is true that a mandatory preliminary injunction,
25 because it alters the status quo, requires the movant to meet a

1 heightened standard of a clear or substantial likelihood of
2 success on the merits and a strong showing of irreparable harm.
3 I'm quoting there from *People ex. rel. Schneiderman v. Actavis*
4 *PLC*, a Second Circuit decision from 2015 reported at 787 F.3d
5 638.

6 But the statute quo, as I understand it, is often
7 defined as the last actual, peaceable uncontested status which
8 preceded the pending controversy. And that is from *Mastrio v.*
9 *Sebelius*, 768 F.3d 116, a Second Circuit decision from 2014.
10 My understanding, therefore, of the status quo, as this is
11 defined, is the situation in which petitioner was neither
12 detained nor subject to removal.

13 It is true as well that a heightened standard has also
14 been required where an injunction will provide the movant with
15 substantially all the relief sought and that relief cannot be
16 undone even if defendant prevails at a trial on the merits.
17 That is the *Doherty* case I mentioned a few moments ago. It is
18 echoed as well in *Yang v. Kosinski*, 960 F.3d 119, a Second
19 Circuit decision from 2020.

20 I think one can fairly argue that granting
21 petitioner's application for injunctive relief would provide
22 him with substantially all of the relief he seeks in the
23 petition. I find that the second prong is not met because if
24 the government prevails, the petitioner can be redetained and
25 can be placed back in removal proceedings.

1 The more complicated issues stem from the fact that
2 the petitioner is challenging government action. It is
3 ordinarily the case in the preliminary injunction setting that
4 a preliminary injunction can be granted where a party
5 establishes either that it is likely to succeed on the merits
6 or that there are sufficiently serious questions going to the
7 merits to make them a fair ground for litigation, with the
8 balance of hardships tipping decidedly in favor of the moving
9 party. There I'm citing to *Otokoyama Co. Ltd. v. Wine of Japan*
10 *Import, Inc.*, 175 F.3d 266.

11 However, "when a preliminary injunction will affect
12 government action taken in the public interest pursuant to a
13 statutory or regulatory scheme, the moving party must
14 demonstrate irreparable harm absent injunctive relief, a
15 likelihood of success on the merits, and public interest
16 weighing in favor of granting the injunction." I am quoting
17 there from *Agudath Israel of America v. Cuomo*, 983 F.3d 620, a
18 Second Circuit decision from 2020. Similar sentiments are in
19 the cases of *Winter v. Natural Resources Defense Council, Inc.*,
20 555 U.S. 7 from 2008, and *New York v. United States Department*
21 *of Homeland Security*, 969 F.3d 42, a Second Circuit decision
22 from 2020. And in this setting the substantial questions or
23 the serious questions standard ought not be used.

24 I wanted to understand the parameters of this
25 particular body of law. So I did what I will colloquially

1 describe as a deep dive into these cases, going back to *Medical*
2 *Society of the State of New York v. Toia* from 1977, and
3 *Hamilton Watch Co. v. Benrus Watch Company* from 1953. What
4 I've learned is that the standard is often cited, but it is not
5 always followed and not followed with perfect consistency.
6 That particular fact was discussed by the Second Circuit in the
7 case of *Trump v. Deutsche Bank AG*, 943 F.3d 627. I recognize
8 that the case was reversed by the Supreme Court, but on other
9 grounds.

10 The Court there examined what it termed the government
11 action exception to the use of the serious-questions standard.
12 In its discussion it recognized that, despite repeated
13 citations to the more restrictive standard, the Court had in
14 two decisions affirmed preliminary injunctions against
15 government action issued using the less rigorous
16 serious-questions standard. Those two cases were *Haitian*
17 *Centers Council, Inc. v. McNary*, 969 F.2d 1326, a Second
18 Circuit decision from 1992, enjoining the INS, and *Mitchell v.*
19 *Cuomo*, 748 F.2d 804, a Second Circuit decision from 1984,
20 enjoining state prison officials.

21 Also in the *Trump* decision, the Second Circuit
22 acknowledged that it had sometimes affirmed decisions that
23 issued or denied preliminary injunctions against government
24 action using both standards.

25 As it happened, the *Trump* court ultimately adopted the

1 more rigorous likelihood-of-success standard to the challenges
2 to subpoenas issued by a congressional committee, but then it
3 ended up deciding the matter under both standards. It's the
4 Court's discussion of competing public interests that informs
5 my decision here.

6 The Court discussed the *Haitian Centers* case and then
7 the original case on which it relied, which was *Plaza Health*
8 *Laboratories v. Perales* from 1989. And what it concluded was
9 that *Haitian Centers* had found that no party had an exclusive
10 claim on the public interest. It is actually a quote from the
11 *Haitian Centers* case. And that point later influenced, it
12 appeared, in the Court's decision in *Time Warner Cable of New*
13 *York City LP v. Bloomberg L.P.*, where the Court found, in
14 noting that there were public interest concerns on both sides
15 of the litigation, they found that the serious-questions
16 standard would be applicable even though the case was
17 ultimately decided under the likelihood-of-success standard.

18 Here, in this case as well, I have identified and the
19 parties have identified for me public-interest concerns on both
20 sides. I recognize that petitioner is challenging a statutory
21 framework that was implemented with due regard for the
22 executive branch's primacy in immigration matters. But the
23 record reflects competing governmental interests at a federal
24 level, and strong countervailing governmental interests at the
25 state and local level.

1 First, I note that this dispute is taking place
2 against the backdrop of a change in administration and a
3 consequent reconsideration of federal immigration policies.
4 That includes the DACA program as to which petitioner seeks
5 renewal, and the policy that forecloses his renewal while he is
6 detained. I recognize -- I want to make clear that I recognize
7 that DACA status is not an entitlement.

8 But the current administration has recognized that the
9 DACA program is a government priority and the government's
10 prioritization of that program is itself a strong
11 countervailing Federal Government action in the public
12 interest.

13 Petitioner was formerly eligible, and might be
14 eligible still, and, thus, there is a countervailing interest
15 in allowing petitioner to pursue this program. I am not in
16 this regard bound by respondent's decision not to grant
17 petitioner parole to pursue the program. It remains a priority
18 for the new administration.

19 Additionally, although respondent argues that
20 petitioner is challenging government action taken in the public
21 interest, the petitioner has pointed to developments that
22 complicate this picture.

23 At oral argument petitioner highlighted three
24 governmental actions that suggested that there are more
25 complicated, more nuanced public interest concerns than

petitioner's removal pursuant to the INA. And these include the January 20 executive order and memo, the February 2 executive order, and the February 18 memo.

The January 20 memorandum, for example, demonstrates that the government prioritized a moratorium on deportations, and the petitioner would fall within that moratorium. The government maintains that petitioner is not entitled to relief under any of these memos or executive orders or policies.

But, more generally, these statements suggest that this is not simply a case where the government's sole interest is removing people pursuant to the INA. Rather, the government has expressed an interest in implementing the INA in a certain way by establishing enforcement priorities, and petitioner is challenging the application of the government's stated priorities to his case.

While petitioner may not be entitled to an order directing the government to prioritize exercise of its enforcement discretion in a particular way, these statements of the government's enforcement priorities suggest that a more nuanced view of government action in the public interest, with that phrase in quotes, is warranted than is asserted by respondents and reinforce that there are public-interest issues on both sides.

Second, and separately, New York City and the State of New York have articulated strong countervailing interests in

petitioner's favor. Petitioner has received a letter from the Law Department of the City of New York, relating that petitioner had been turned over to ICE in violation of the City's detainer law. And New York State has publicly expressed a strong public interest against the removal of individuals like petitioner, for example, in its amicus brief in the Texas litigation, mirroring the Federal Government's own priorities, as articulated in the January 20 memo and the executive order.

The *Trump* court noted, and the cases it cited were the *Time Warner* case and the *Hatian Centers* case, that where there are public-interest concerns on both sides of the litigation, the serious-questions standard would be applicable. And for these reasons, and on what I believe to be the rather unique facts of this case, I am using the serious-question standard.

And what I'll do now is to explain why I find why that there are substantial or serious questions regarding my own jurisdiction to hear this case and regarding petitioner's due process issues.

I will note, in the issue of jurisdiction and other sort of opening issues, I don't believe the venue issues are an issue in this case. I do have my view regarding core and noncore claims, and that was set forth in the case of *Gomez v. Decker*, but I also agree that noncore claims can be brought in a legal custodian district, such as the Southern District of New York, and I've been advised that petitioner is arguing only

1 noncore claims here, so I don't find a venue problem.

2 The larger issue for me is the issue identified by
3 respondent about whether I have jurisdiction to review
4 petitioner's claims. For that I turn to Section 1252 of Title
5 8 of the United States Code, which is the section of the INA
6 that covers judicial review of removal orders. I'm also
7 looking at the amendments over time and the court cases
8 interpreting it.

9 After doing that, I conclude that there are
10 substantial or serious questions that both prevent me from
11 dismissing the petition outright and that satisfy the
12 serious-questions prong of the preliminary injunction standard.

13 Beginning at the beginning with the Real ID Act, in
14 2005, after the Supreme Court's decision in *INS v. St. Cyr*,
15 Congress amended the statute to expressly include habeas review
16 under 2241 in the forms of prohibited judicial review of
17 removal orders, thereby superseding that portion of *St. Cyr*.
18 And Section 1252(a)(5) provides, in essence, for a pipeline
19 that begins with the immigration judge, goes next to the BIA,
20 and next to the Court of Appeals.

21 The Second Circuit has construed this provision
22 broadly to preclude district courts from exercising subject
23 matter jurisdiction over an action that even indirectly
24 challenges an order of removal. As one case for that
25 proposition I cite *Delgado v. Quarantillo*, 643 F.3d 52, 55, a

1 per curiam Second Circuit decision from 2011.

2 But the parties have focused on 1252(g). I won't read
3 all of it into the record, because the parties are so familiar
4 with it, but in large measure the focus is on this part. No
5 court shall have jurisdiction to hear any cause or claim by or
6 on behalf of any alien arising from the decision or action by
7 the Attorney General to commence proceedings, adjudicate cases,
8 or execute removal orders against any alien under this chapter.

9 The intended effect of this provision is to strip
10 district courts of jurisdiction, to hear removal order-related
11 claims that ought to be funneled through the BIA to the circuit
12 court, in accordance with subsection (a)(5).

13 The issue, however, is that the Supreme Court itself
14 has said that the language in 1252(g) does not sweep in any
15 claim that can technically be said to arise from the three
16 listed actions of the Attorney General. Instead, we read the
17 language to refer just to those three specific actions
18 themselves: Commencing proceedings, adjudicating cases, and
19 executing removal orders. That is from the Supreme Court's
20 decision in *Jennings v. Rodriguez*, 138 S. Ct. 830 from 2018,
21 and it, in turn, is relying on a case cited to me by the
22 parties, *Reno v. American-Arab Anti-Discrimination Committee*,
23 525 U.S. 471 from 1999.

24 So the issue and the question before us is whether a
25 suit brought against immigration authorities is or amounts to a

1 challenge to a removal order. Many courts have found in this
2 district that it is not per se a challenge to a removal order,
3 and whether it is or not turns on the substance of the relief
4 that plaintiff seeks. One of many cases for that proposition,
5 *Vidhja v. Whitaker*, 2019 WL 1090369.

6 The *Vidhja* case notes, and it is true, that numerous
7 courts in this circuit have held that a request for a stay of
8 removal constitutes a challenge to a removal order, and that,
9 accordingly, district courts lack jurisdiction to grant such
10 relief. But other cases have found that subsection (g) doesn't
11 preclude jurisdiction under certain circumstances, including
12 the *You* case, 321 F.Supp. 3d 451, or *Calderon v. Sessions*, 330
13 F.Supp. 3d 954.

14 Of the courts that have decided that 1252(g) does not
15 strip jurisdiction to hear habeas petitions under certain
16 circumstances, some have read the provision not to apply to
17 challenges to the legal authority to remove in a general or in
18 a particular way, and others have acknowledged that the
19 provision might apply to nondiscretionary decisions, but must
20 be read not to apply, so as to avoid constitutional problems.
21 The *S.N.C.* decision that we have discussed at oral argument and
22 the *Siahaan* decision that we discussed at oral argument also
23 speak to these issues.

24 Related or interrelated with this question of the
25 scope or interpretation of 1252(g) is the issue of reading

1 1252(g), as respondents request that I do, would run afoul of
2 the suspension clause. And in that regard I have considered
3 the principal Supreme Court cases on the issue, as well as the
4 most recent Court of Appeals decision.

5 We begin with *INS v. St. Cyr*, which I mentioned
6 earlier. However, that case was, as noted, superseded by the
7 Real ID Act. It noted in that case, and this has consequences
8 for later analysis that, at the absolute minimum, the
9 suspension clause protects the writ as it existed in 1789.

10 After *St. Cyr*, there was *Boumediene v. Bush*. I know
11 it was not an immigration case, but it was nonetheless
12 significant in that it listed requirements or gave ideas and
13 guidance on requirements for adequate and effective substitutes
14 in lieu of habeas, which were designed to avoid suspension
15 clause problems, and it discussed minimum criteria for
16 substitute procedures.

17 And then, most recently, we have had *Department of*
18 *Homeland Security v. Thuraissigiam* from last year, and it's the
19 case on which the parties have focused the most. It was an
20 immigration case. It concerned the availability of habeas
21 relief to challenge expedited removal orders, where the
22 applicable jurisdiction-stripping provision was Section
23 1252(e).

24 In that case, however, again, the focus was on
25 Founding Era precedent. Justice Alito, writing for the Court,

1 claimed that the petitioner had so conceded. I actually went
2 back, and I don't think that was the case, but that is what he
3 found.

4 It doesn't purport to decide whether the scope of the
5 habeas writ has expanded since the Founding Era. It does
6 suggest that the suspension clause only applies to core habeas
7 claims, as understood at the Founding Era, and it summarily
8 dismissed due process arguments, asserting that petitioner had
9 no due process rights because he was effectively stopped at the
10 border.

11 There are differences though. Let me say this. I
12 recognize that there is language in *Thuraissigiam* that would
13 seem to doom petitioner's claims. There is language, for
14 example, that the relief sought might fit an injunction or writ
15 of mandamus, but falls outside the scope of the common law
16 habeas writ.

17 But here, unlike in *Thuraissigiam*, Mr. Castillo, the
18 petitioner, is not asking this Court either for vacatur of his
19 removal order or for a directive of any kind to the BIA.
20 Rather, he's seeking merely to be permitted to remain in this
21 country while his motion to reopen proceeds through the BIA and
22 possibly to the Second Circuit.

23 That said, it seems to me that his request for the
24 Court to direct ICE to follow parole request procedures would
25 seem to fall within the scope of that paragraph or that

1 language in *Thuraissigiam*.

2 *Thuraissigiam* also noted that simply releasing
3 Mr. *Thuraissigiam* would not provide the right to stay in the
4 country that his petition ultimately seeks. Without a change
5 in status, he would remain subject to arrest, detention, and
6 removal.

7 But here, by comparison, releasing Mr. Castillo would
8 give him the chance to pursue DACA relief and would make his
9 opportunity to obtain relief through the motion-to-review and
10 the petition-for-review process considerably more meaningful.

11 I have looked at other cases, both pre and post
12 *Thuraissigiam*. Justice Alito speaks of the case of *Heikkila v.*
13 *Barber*, 345 U.S. 229 from 1953. That case itself assumes that
14 the constitutional scope of the writ covers collateral attacks
15 on deportation orders. I think Justice Alito may have
16 misspoken or misperceived that in the *Thuraissigiam* decision,
17 but I leave that for someone else to ultimately determine.

18 There are also cases, pre and post *Thuraissigiam*,
19 discussing whether the motion to reopen proceeding is an
20 adequate and effective substitute. What is interesting to me
21 is that in several of these cases they have distinguished their
22 case from situations in which the petitioner not only could not
23 be removed before the motion was adjudicated, but also had a
24 credible fear of persecution or torture in the country of
25 removal, such that he may not have an opportunity to file or

1 have adjudicated a postremoval motion to reopen. I am quoting
2 here from the case of *Barros Anguisaca v. Decker*, 393 F.Supp.
3 3d. This pinpoint cite is at 352, and it lists a series of
4 cases. I do think that this case before me is and fits within
5 those circumstances.

6 The *Joshua M. v. Barr* case from the Eastern District
7 of Virginia, the *Siahaan* case that I mentioned earlier, were
8 cases in which district courts had concluded that threats of
9 physical injury within a country of removal undermined the
10 ability to effectively prosecute claims before the BIA and to
11 bring a petition for review to a circuit court from the removed
12 country and, therefore, made the process an inadequate
13 substitute for habeas relief.

14 I will just note in that regard as well that the Sixth
15 Circuit's decision in *Hamama v. Adducci*, in particular, the
16 dissenting opinion of Judge White noted that protection against
17 the executive action of removal is within the recognized scope
18 of habeas, and the petition for review procedure provides an
19 inadequate substitute for habeas under the circumstances
20 presented here, which are akin to the ones in this case. And
21 the district court, therefore, properly exercised jurisdiction
22 over that claim.

23 Looking at those cases, they still left open the
24 possibility that there were situations in which either 1252(g)
25 ought not apply or, if it did apply, there would be suspension

1 clause issues for which there was not an adequate and effective
2 substitute.

3 I recognize that post-*Thuraissigiam* the circuit courts
4 that have decided the issue have not found suspension clause
5 issues. But with appropriate respect to those circuits, I
6 found that the reasoning didn't engage fully with the issues
7 that the parties have brought to my attention in this case, and
8 so I note them. But it doesn't detract from my ultimate
9 conclusion that there is a substantial or serious question on
10 the issue.

11 These cases include *Gicharu v. Carr* from the First
12 Circuit, reported at 983 F.3d 13; *EFL v. Prim*, the very recent
13 decision from the Second Circuit contained at 2021 WL 244606;
14 and *Tazu v. Attorney General*, 975 F.3d 292, a Third Circuit
15 decision from 2020.

16 *Tazu*, in particular, I find not persuasive because
17 having told me that there is no problem and there are no due
18 process issues, it then ends by saying, and I quote,
19 "fortunately, his removal is already stayed before the Second
20 Circuit. We trust that he will be able to stay here with his
21 family while he seeks relief." As precedent, that helps me not
22 at all.

23 Ultimately, and I thank you for your indulgence as I
24 went through that case law, I find substantial questions
25 regarding whether 1252(g) strips me of jurisdiction, and if so,

1 whether such jurisdiction stripping would violate the
2 suspension clause.

3 To begin, I find that the courts' disparate
4 constructions of the scope of 1252(g) itself both prevents me
5 from concluding that I lack jurisdiction and raises a
6 substantial question as to whether the bar even applies in this
7 case. The plain text of the statute would seem to cover a
8 broad range of proceedings. But the Supreme Court in *Jennings*
9 instructed courts to read the provision narrowly and not
10 literally. How narrowly is an open question that has led
11 courts to differing conclusions, often influenced, whether
12 expressly acknowledged or not, by the canon of constitutional
13 avoidance, and I cannot say with certainty that that statute
14 operates to strip me of jurisdiction.

15 If I did, I would proceed to the next level of
16 substantial or serious questions, addressing suspension clause
17 issues, and this conclusion proceeds from two findings: (i)
18 there is support in the case law for holding that the writ has
19 evolved since 1789 and extends to this situation, such that the
20 suspension clause would apply; and (ii) the statutory
21 channeling of claims from the immigration judge, to the BIA, to
22 the circuit Court of Appeals, is an inadequate substitute for
23 habeas on the facts of this case.

24 Let me speak first about the support in the case law.
25 The cases that I mentioned from the Supreme Court, *St. Cyr*,

1 *Boumediene*, and even *Thuraissigiam*, acknowledged, through use
2 of their "at a minimum" language, that the Court was discussing
3 the writ as existed in 1789. But this repeated use of
4 qualifying language suggests that the writ is or could be
5 broader than what had been outlined in those decisions. The
6 *Heikkila* Supreme Court decision and the *Hamama* dissent, to
7 which I referred above, presented evidence from the founding
8 period and beyond regarding a broader conception of the writ to
9 which the suspension clause would apply.

10 On the issue of what qualifies as an adequate and
11 effective substitute, I'm drawing my instruction from the
12 Second Circuit's decision in *Luna v. Holder*, and there are
13 several factors that are called to my attention.

14 One is that the purpose and effect of the substitute
15 was to expedite consideration of the detainee's claims and not
16 to delay or frustrate it. One is that the scope of the
17 substitute procedure ought not be subject to manipulation by
18 the government. Third, a mechanism for review that is wholly a
19 discretionary one is an insufficient replacement for habeas.
20 And, fourth, the entity substituting for a habeas court must
21 have adequate authority to formulate and issue appropriate
22 orders for relief, including the power to order the conditional
23 release of an individual unlawfully detained.

24 The petitioner has argued here that the existing
25 statutory scheme does not satisfy these requirements, at least

1 on the facts of this case. I conclude that these arguments
2 raise a substantial question regarding my jurisdiction and
3 regarding the constitutional problems that would adhere if
4 Section 1252(g) were found to bar jurisdiction here.

5 The BIA handling of stay-of-removal requests is, it
6 has been submitted to me, opaque and rushed. It is unclear
7 what the standards are for granting or denying a stay, and it
8 is argued that it yields arbitrary results. I have also been
9 presented with an amicus brief in the *Ixcoy Caal v. Decker* case
10 making that point as well.

11 Another complaint is that the stay request and the
12 motion to reopen are not handled together, creating what at
13 least one court has called a jurisdictional no man's land.

14 A third challenge is that the petitioner is likely to
15 be removed before he has the chance to petition the Second
16 Circuit for a stay, thereby undermining the effectiveness of
17 the alternative process. It doesn't provide relief from the
18 underlying executive action, which is removing him to a country
19 where, petitioner alleges, he faces a risk of persecution and
20 violence.

21 For these reasons, I am finding substantial questions
22 dealing with 1252(g) itself. I am also finding substantial
23 questions regarding the procedural due process to which
24 petitioner is entitled.

25 Now, petitioner argues that he has a right under the

1 Fifth Amendment due process clause, to adjudication of his
2 motion to reopen and his parole request before he is removed.
3 Many of the arguments are ones I have just repeated, that it is
4 unlawful to deport people before they have had a full and fair
5 opportunity for review particularly in the asylum and CAT
6 context, the jurisdictional no man's land argument, and that
7 the ability to get a stay of removal from an IJ or the BIA is
8 inadequate to protect one's rights because the process results
9 in arbitrary and capricious decisions and no ability to appeal
10 a stay of the denial to the circuit court before a final
11 decision on the motion to reopen.

12 Ultimately, I do conclude that these do raise serious
13 or substantial questions regarding the due process rights.

14 The Fifth Amendment's due process clause mandates that
15 no person shall be deprived of liberty without due process of
16 law. This clause applies to all persons within the United
17 States, including aliens, whether their presence here is
18 lawful, unlawful, temporary, or permanent. I am quoting here
19 from *Zadvydas v. Davis*, 533 U.S. 678, a Supreme Court decision
20 from 2001, and *Thuraissigiam* itself confirms that aliens who
21 have established connections in this country have due process
22 rights in deportation proceedings.

23 The next issue, therefore, is whether there is a
24 cognizable liberty or property interest. Petitioner has
25 suggested to me that there are. He has cited a liberty

1 interest in remaining in the United States, a statutory right
2 to move to reopen his proceedings, and an entitlement under law
3 to not be deported to a country where persecution would occur.

4 The fundamental requirement of due process is the
5 opportunity to be heard at a meaningful time and in a
6 meaningful manner. I quote there from *Mathews v. Eldridge*, 424
7 U.S. 319 from 1976.

8 The adequacy of these procedures is a function, in
9 part, of the magnitude of the interest at stake and the
10 likelihood of erroneous deprivation.

11 In the Second Circuit's decision in *Hechavarria v.*
12 *Sessions*, the Court noted that the statutory procedural
13 protections of judicial review and stays are essential tools in
14 meeting the government's constitutional obligation to provide
15 procedural due process for immigrants facing removal. Our
16 power and obligation to participate meaningfully in the
17 statutory scheme, as structured by the Constitution, is a
18 foundational element of our analysis in this appeal.

19 Turning now to the application of these principles to
20 the facts of this case.

21 I conclude that the deportation of the petitioner
22 before he is able to file a petition for review at the Second
23 Circuit makes the opportunity for judicial review by the Second
24 Circuit less meaningful.

25 There is also the distinct possibility that he will

1 suffer -- in fact, he will suffer irreparable harm in the
2 meantime, not merely the threat of harm to himself, in
3 Honduras. But the foreclosure of his eligibility for DACA
4 renewal.

5 I would also like to reiterate and remind the parties
6 of the concerns I just raised with respect to the suspension
7 clause analysis regarding how BIA stay request review works and
8 whether it is sufficient to protect against the erroneous
9 deprivation of liberty.

10 I'm also persuaded by the analysis of a district court
11 in California, to be sure, in *Chhoeun v. Marin*, 306 F.Supp. 3d,
12 1147, noting there that the requested injunction would ensure
13 that petitioners have adequate time and opportunity to access
14 the system that has been constructed to prevent erroneous
15 removals. It is a system that includes the thorough exhaustion
16 of an administrative process and judicial review by the
17 appropriate Court of Appeals. The Court finds that the
18 requested procedural protections are necessary to comport with
19 due process. So I do find substantial question as to the scope
20 and operation of 1252(g) and the due process issues raised by
21 petitioner.

22 I want to just note, for completeness, that there is a
23 third argument that I do not find to be a substantial question.
24 That is the argument that petitioner has made that removal
25 would violate the 100-day moratorium and DHS' own enforcement

1 priorities and that the injunction issued in the Southern
2 District of Texas should not apply to him.

3 This particular challenge would seem to me to be
4 barred by 1252(g) and not appropriately a subject of the
5 *Accardi* doctrine or a claimed violation of the APA to
6 circumvent that bar.

7 The February memorandum recited that it may not be
8 relied upon to create any right or benefit, substantive or
9 procedural, enforceable at law by any party in any
10 administrative, civil, or criminal matter. More pointedly, the
11 memorandum makes clear that it enjoins blanket removal, but it
12 leaves DHS with the discretion to pursue removal in individual
13 circumstances. Based on the submissions of the parties and the
14 representations made to me in oral argument, I'm confident that
15 DHS did not misperceive its discretion in placing or replacing
16 the petitioner in removal proceedings.

17 Nonetheless, I do find serious questions on the other
18 two areas, the scope of the writ and how it interacts with the
19 suspension clause, and the possibility of due process issues.

20 Having found that, and I realize -- I promise you, for
21 a moment of levity, that the rest of this is a lot shorter.
22 But having found this issue, I focused the most time on the
23 merits issue, on the substantial questions issue, because it
24 has the most complexities. But petitioner must also
25 demonstrate that the balance of hardships tips decidedly in his

1 favor, and on that I find that it does.

2 The Second Circuit has shown or has held, excuse me,
3 that a showing of irreparable harm is the single most important
4 prerequisite. I'm quoting from the *Yang* decision I mentioned
5 earlier. To demonstrate irreparable harm, the movant must
6 demonstrate that they will suffer an injury that is neither
7 remote nor speculative, but actual and imminent, and one that
8 cannot be remedied if a court waits until the end of the trial
9 to resolve the harm. I'm quoting there from *Faiveley*
10 *Transportation Malmo AB v. Wabtech Corporation*, 559 F.3d 110, a
11 Second Circuit decision from 2009.

12 I accept the petitioner's arguments in this regard
13 that removal prior to adjudication of his motion to reopen
14 would violate his due process rights, and that there would be a
15 presumption of irreparable injury that flows from a violation
16 of constitutional rights. It would make him ineligible for
17 DACA. It would render him vulnerable to the risk of
18 persecution and harm in Honduras, and there is a personal cost
19 of being separated from his family in the United States.

20 A lot of these irreparable harm issues flow naturally
21 into the question of the balance of equities and the public
22 interest, and for this reason I find as well that the balance
23 of equities tips decisively and decidedly in petitioner's
24 favor.

25 There are other issues, though, including the medical

1 issues that have been identified by petitioner's counsel.

2 There is also a public interest in the constitutionally sound
3 and fair administration of the immigration laws. There are
4 completing public interests in terms of New York City's
5 detainer law and New York State's interest as expressed in its
6 amicus brief.

7 And, conversely, it is not as evident why there needs
8 to be such a rush to remove petitioner at this time,
9 particularly since he does not seem to fall within the
10 administration's enforcement priorities set forth in the
11 various memoranda that were identified last week.

12 I have reviewed the government's letter of yesterday
13 discussing the circumstances of the dropping of the criminal
14 charges against petitioner. The fact of his arrest, however,
15 does not affect my decision. I had a reference to allegations
16 that were dropped. I have no evidence substantiating them.

17 I do want to make clear what I am and am not doing
18 here. In granting injunctive relief I am not saying that
19 petitioner is entitled to have this case reopened by the BIA.
20 I am not saying that he is entitled to DACA eligibility
21 renewal. All that I'm saying is that he has raised
22 sufficiently meritorious legal issues and that he has presented
23 sufficiently compelling evidence on the remaining factors of
24 the preliminary injunction analysis that he should not be
25 removed from this country by undertaking those efforts.

1 Related to this issue is the question of *Mapp* relief.
2 The Court has inherent authority to grant bail to habeas
3 petitioners when the petition raises substantial claims and
4 extraordinary circumstances make the grant of bail necessary to
5 make the habeas remedy effective. I am quoting there from the
6 decision itself.

7 The *Mapp* holding has been affirmed and extended post
8 Real ID Act. It's done so in the first instance in *Elkimiya v.*
9 *Department of Homeland Security*, 484 F.3d 151, a Second Circuit
10 decision from 2007, and the *S.N.C.* district court decision from
11 2018 also makes reference to it.

12 I find that petitioner has raised substantial claims.
13 More pointedly, I am advised that he cannot effectively apply
14 for renewal of his DACA eligibility or relief while detained
15 and that bail is necessary to permit him to do that. ICE has
16 denied his parole request, and he was not granted bail earlier
17 this week.

18 There are certain medical issues that I understand may
19 not be or may not be as well addressed while he is detained. I
20 do recognize that severe health issues have been a basis for
21 *Mapp* relief in the past, and this happened particularly last
22 year in the context of certain habeas requests that were
23 occasioned by the COVID-19 pandemic.

24 They are not the principal basis for the relief that I
25 am awarding. I am expecting that the medical issues of which

1 petitioner complains will be addressed very promptly upon his
2 release.

3 As I noted earlier, and want to underscore again, I am
4 granting *Mapp* relief in order to allow petitioner to pursue his
5 DACA renewal. I recognize that the effect may be to ease other
6 burdens that he has, his medical issues or his immigration
7 litigation more broadly. But I'm granting the relief to allow
8 the DACA process to proceed. If that concludes before the
9 motion to reopen is resolved, that may well amount to changed
10 circumstances warranting the resumption of petitioner's
11 detention.

12 That is my resolution of the preliminary injunction
13 motion. There are a few sort of miscellaneous matters I want
14 to address with the parties.

15 Again, perhaps reflecting my experience, which may be
16 different from all of your experiences, I would expect the
17 parties would be able to agree on the conditions of a bond for
18 Mr. Castillo's release. It was not my intention to just let
19 him out with no conditions whatsoever. So my hope would be
20 that I could allow a period of time that would be sufficient
21 for the parties to either come to a decision or to come to me
22 with your competing proposals and let me decide. That's what I
23 am proposing for the parties.

24 Related to that, I'd like to just address Ms. Friedman
25 for a moment.

1 Ms. Friedman, if this is a matter where the government
2 wishes to appeal and wishes to prevent Mr. Castillo from ever
3 leaving the facility, I am prepared to stay my decision for a
4 couple of days because I do think -- I want to give the
5 parties -- let me say this. As I am staying this decision,
6 what I'm expecting is that the parties will get together and
7 figure out bail conditions and/or the government will appeal to
8 the circuit and ask for what I've done today to be undone.

9 Ms. Friedman, I realize I am springing this on you
10 with no notice, but it was my intention to stay the effect of
11 my decision or -- in other words, that Mr. Castillo was not
12 getting out before Wednesday of next week -- to give everybody
13 a chance to propose a bond and to give the government a chance
14 to decide whether it wants to appeal.

15 Ms. Friedman, beginning with you, is there any reason
16 why I may not do that?

17 MS. FRIEDMAN: I am not aware of any, your Honor. ICE
18 has already committed that he will not be removed prior to that
19 date anyway, so I'm not aware of any.

20 THE COURT: Ms. Friedman, on my larger point about you
21 and your adversaries consulting about a bond, you heard me
22 mention last year, and last year during the height of the early
23 pandemic, I had discussions with members of your office
24 regarding meetings to propose bonds for folks who were detained
25 at the Orange County Jail. In those cases they were let out

1 because of very serious medical conditions, but they weren't
2 let out on their own recognizance. There was a bond. For this
3 reason, I thought or I think that the parties could get
4 together and agree upon conditions.

5 Ms. Friedman, is that a thing that can be done or is
6 what I'm saying completely foreign in this context?

7 MS. FRIEDMAN: My office has definitely had
8 conversations where they have agreed and presented things to
9 judges, so I definitely think we can have conversations with
10 opposing counsel.

11 THE COURT: Thank you.

12 Ms. Friedman, is there anything that I have omitted
13 resolving from your perspective?

14 MS. FRIEDMAN: I don't believe so, your Honor.

15 THE COURT: Thank you.

16 I know one of the downsides of having an oral decision
17 is, you need to think about everything I've said and perhaps
18 get a transcript and look at everything I have said, but I
19 believe I addressed everything that the parties wanted me to
20 address.

21 Ms. Austin, the same questions to you. I am not
22 letting your client out the door before Wednesday, hoping that
23 the parties can agree on a bond or the Second Circuit will do
24 something or not do something.

25 Do I understand that you will be able to have those

1 discussions or another member of your team will be able to have
2 those discussions with the government about the bond?

3 MS. AUSTIN: We absolutely can, your Honor. I would
4 ask, given that in the past my experience in this situation is
5 often that we diverge on at least some points, whether you
6 would want a single letter summarizing both parties' positions,
7 or two, and also by what date, to the extent that we do not
8 reach agreement on full conditions. I think we could do that
9 as soon as 24 hours from now or tomorrow afternoon, but I think
10 we are eager to keep the process moving and give your Honor
11 time, to the extent there is any disagreement, but we would, of
12 course, conform with whatever schedule you set for the
13 submission of that one or two letters.

14 THE COURT: I think one or two letters by end of day
15 Monday because I'm telling myself that if you have additional
16 time you will get that much closer to resolution. But Monday
17 will still give me time to decide the issues. Close of
18 business. The normal close of business hours. Not midnight,
19 please. But that seems to make the most sense.

20 I've had it both ways. If the parties want to have
21 one letter with both sets of positions, fine. If you want two
22 letters, fine. I'm agnostic on the issue. I just want
23 everyone's views on things.

24 Ms. Austin, this second line of questioning is, from
25 your perspective, is there anything that I have left open?

1 MS. AUSTIN: I don't believe so, your Honor.

2 To the extent that there is anything logistical, I
3 think we could include it in our letter as far as the
4 logistical steps necessary for a district court to enter a
5 bond. That's been somewhat difficult to effectuate in the
6 past, but we can incorporate that into our discussions with the
7 government and address any issues in our submission.

8 THE COURT: I know I've done it, because I know I've
9 done it last year, and I know a number of my colleagues have
10 done it last year, with particular respect to the Orange County
11 Jail. So I'm assuming something similar could be put together,
12 and I will let you speak with your colleagues and see what that
13 is. Again, I just did not want to leave anyone with unresolved
14 issues.

15 Ms. Austin, from your perspective and your colleague's
16 perspective, is there anything else to address in this
17 proceeding?

18 MS. AUSTIN: I don't believe so, your Honor.

19 THE COURT: Ms. Friedman, is there anything else to
20 address in this proceeding?

21 MS. FRIEDMAN: No, your Honor.

22 THE COURT: I thank you all very much. I thank you in
23 particular for your patience as I reviewed the oral decision.

24 Be well each of you. We are adjourned. Thank you.

25 (Adjourned)